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91-639

Supreme Court, U.S.
FILED
OCT 15 1991
OFFICE OF THE CLERK

NO. 91-

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RUSSELL H. WOGAN,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

MAY A SENTENCING JUDGE GRANT A "DOWNWARD DEPARTURE" FROM THE APPLICABLE GUIDELINE RANGE UNDER THE FEDERAL SENTENCING GUIDELINES IN ORDER TO REMEDY AN UNWARRANTED SENTENCE DISPARITY AMONG DEFENDANTS IN THE SAME CASE ?

LIST OF PARTIES

The United States of America named Petitioner, Russell H. Wogan, and Daniel J. Casale[1] in a three-count indictment dated August 14, 1990 in the United States District Court, District of Maine. (Criminal Docket No. 90-00042P)

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[1]. The case of co-defendant Casale is not before the Court.

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OPINIONS BELOW

1. United States of America v. Russell H. Wogan, 938 F.2d 1446 (1st.Cir.1991) This opinion was No. 91-1214 in the United States Court of Appeals for the First Circuit, dated July 18, 1991.

JURISDICTION

On January 24, 1991, the Petitioner appeared in the United States District Court, District of Maine for sentencing, and Judgment was entered as to the sentence on January 25, 1991. The United States Government appealed to the United States Court of Appeals for the First Circuit from the Judgment entered.

In United States of America v. Russell H. Wogan, 938 F.2d 1446 (1st.Cir.1991)(No. 91-1214 in the United States Court of Appeals for the First Circuit, dated July 18, 1991), the court granted the United States Government's appeal, and the Petitioner was resentenced in the United States District Court, District of Maine, in accord with the opinion of the First Circuit Court of Appeals. Judgment was entered as to the

resentencing on September 16, 1991.

The Jurisdiction of the United States Supreme Court is invoked under Title 28 United States Code § 1257(a) and the Rules of the Supreme Court of the United States as effective January 1, 1990. (specifically Rules 10.1, 12.1 and 13.1)

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. United States Sentencing Commission, Guidelines Manual, Part A(4)(b);

2. United States Sentencing Commission, Guidelines Manual, Section 5K2.0;

3. Title 18 United States Code, Section 3553(b).

NOTE: The above are set forth in full in the Appendix following the argument.

STATEMENT OF THE CASE

In July of 1990, Russell Wogan was arrested with Daniel J. Casale by officers of the Portland, Maine Police Department and charged with having committed the offenses of distribution of heroin, possession of heroin with intent to distribute, and conspiracy to possess with intent to distribute heroin. Wogan and Casale were charged as co-defendants with the same crimes by a single Indictment.

Casale plead guilty to the Indictment on September 5, 1990 and Wogan entered a guilty plea to the charges of the Indictment on September 26, 1990. Neither defendant entered into a written plea agreement before entering a guilty plea.

The United States Department of Probation prepared Presentence Reports for the Petitioner, Wogan, and co-defendant

Casale. Both Presentence Reports contained similar factual information regarding the crimes charged.

Wogan's Presentence Report stated that in July of 1990, a confidential informant met with officers of the Portland Police Department and indicated that Wogan and Casale had been bringing amounts of heroin by automobile from Massachusetts to Maine for distribution in the Portland, Maine area. The informant claimed to have bought heroin from Wogan and Casale. A controlled buy was arranged by police on July 23, 1990 and the informant engaged Wogan and Casale at their home in Scarborough, Maine, where they purchased three small bagies of a substance which was subsequently analyzed as heroin.

The Presentence report also stated that on July 24, 1990, the informant

offered Casale and Wogan $300.00 to use in the purchase of heroin. On the same day, Portland, Maine Police Officers stopped Casale and Wogan and placed them under arrest. Bags containing heroin were recovered from the Wogan and Casale pursuant to a search following their arrest, and laboratory analysis showed that the pair had possessed 5.56 grams of approximately 23% pure heroin.

The Presentence Report speculated that the pair had brought heroin to Maine many times Between February 1, 1990 and July 24, 1990. Without stating any positive evidence, the Presentence Report stated that testimony of "cooperating co-conspirators" would support the conclusion that Wogan and Casale had introduced 750 grams of heroin into Maine over a period of time.

The pair entered guilty pleas to the

charges stated against them by the Indictment. In preparation for sentencing the United States Department of Probation and Parole calculated the offense level under the Sentencing Guidelines for Wogan. Using a figure of 750 grams of heroin as the amount of drugs involved in the offense under § 1B1.3 of the Sentencing Guidelines, a base offense level of 30 was established. Wogan received a downward adjustment of two levels for acceptance of responsibility. Applying an Offense Level of 28 to a Criminal History Category of II, the Sentencing Table found at § 5.2 of the Guidelines established a sentencing range of 87 to 108.

A similar method of calculating the sentencing range was used for Casale, who appeared on November 21, 1990 for sentencing. At Casale's sentencing, the United States presented a witness, Walter

Slusser, who testified that he had become associated with Casale in January 1990 and that he obtained heroin from Casale in Portland a "few times". (Casale Sentencing Transcript at 8) [2] In the beginning of 1990, the witness testified he would purchase from Casale "a couple of bags a day here and there". (C.T.9). In March of 1990, the witness testified that Wogan and Casale became good friends. (C.T.10).

The Government also called Walter Slusser's wife, who testified as to the amount of heroin that she and her husband has purchased from Casale and Wogan. (C.T.37-39). Mrs. Slusser testified that the largest amount of heroin she saw Casale and Wogan transport back to Maine was two bundles or 20 bags of heroin. (C.T.42) Then, the Government called

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[2]. Hereafter, references to the Casale Sentencing Transcript will be "C.T.".

Portland Police Department Detective George Connick to refute the testimony of Mrs. Slusser. Connick testified that Mrs. Slusser had told him she had purchased 500 bags of heroin from Casale and Wogan from February to June of 1990. (C.T.51)

United States Probation Officer Henry Milburn was called at the Casale Sentencing Hearing by the Government to testify about a conversation which allegedly occurred between Russell Wogan and another probation officer who had interviewed Wogan at the local jail. (C.T.53) Milburn testified that the second probation officer asked Wogan whether 750 grams was a reasonable estimate of the amount of heroin distributed by Casale and Wogan in the District of Maine, and that Wogan had said he believed the figure was correct. (C.T.55).

The sentencing judge was not pursuaded by the Government's evidence and did not find, by a fair preponderance of the evidence, that there were 750 grams involved the course of dealing. (C.T.60) The judge explained that the testimony showed that the correct drug quantity for the purpose of sentencing was 10.19 grams, using the amount involved in the offense and the testimony of the persons who stated they purchased drugs from Wogan and Casale. (C.T.61-62.) Defendant Casale was sentenced on the basis of this finding to 27 months in prison followed by a term of five years supervised release. (C.T.74).

Wogan appeared for sentencing on January 3, 1991 before the same district court judge who had sentenced Casale. This time, Donald Hawley, the probation officer who had interviewed Wogan at the jail testified as to the conversation

whereby Wogan stated that 750 grams was a likely figure as to the quantity of drugs he had been involved with over a period of time. Hawley also testified that he could not get a definite "yes" answer from Wogan as to the question of whether 750 grams of heroin was a correct amount. (Sentencing Hearing of Russell Wogan)[3]

The court adjourned the hearing and reconvened on January 16, 1991. At that time the sentencing judge noted there had been a divergence in the creation of the record by the Government between the hearing for Casale and the hearing for Wogan. (S.H.28A) The court found 750 grams of heroin was the amount that was actually involved in the related conduct that was to be taken into account in determining the base offense level for

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[3]. Hereafter, the Sentencing Hearing of the Petitioner will be designated as (S.H).

Wogan. Then, the court referred to 18 U.S.C. §3553(b) and Sentencing Guideline 5K2.0 authorizing departure from the Guidelines:

> ...I think I know pretty much where the truth and justice of this situation lies. The fundamental purpose of the guidelines is to avoid disparity in sentencing. It was the driving idea that fostered the guideline and that's what underlies the whole procedure for computing and determining sentences. That procedure in this case in (sic) my basis for departure and I will depart downward.
>
> I am inclined to say the extent of departure is governed by the Court's conclusion that in order to avoid unwarranted disparity between the sentence of this defendant and co-defendant of (sic) Casale, he should not receive a longer term of sentence than Casale who received 27 months. ...

(S.H.28D).

Sentence was finally imposed on January 24, 1991. The district court found that the total quantity of heroin to be used in calculating Wogan's base offense level was 755.75 grams. Applying

U.S.S.G. § 2D1.1(a)(3)(C)(7), the court determined a base level of 30 and granted a two level reduction for acceptance of responsibility, bringing the level to 28. (S.H.34)

Wogan's Guideline Range was found to be 87 to 108 months when the 750 gram figure was used to calculate his base offense conduct along with the 5.75 grams involved in the offense itself. (S.H.33).

Relying upon United States v. Daly, 883 F.2d 313 (4th Cir.1989), the district court determined it would depart from the Guideline sentencing range because the factual circumstances of this sentencing were not adequately considered by the Sentencing Commission in framing the Guidelines. (S.H.45). Wogan was sentenced to 27 months and a five year term of supervised release "in order to avoid unwarranted disparity between the sentence

of this defendant and that of co-defendant Daniel J. Casale". (S.H.47).

In its written judgment entered on January 25, 1991, the district court judge explained:

> ... significantly different sentencing findings relative to amount of heroin in this joint venture threatened disparate sentences for co-defendants. The Court found this difference to be a mitigating circumstance to a degree not adequately taken into consideration by the Sentencing Commission. The Court's efforts were aimed at avoiding disparity.

The United States appealed and the Circuit Court of Appeals for the First Circuit granted the Government's appeal and ordered Wogan to be resentenced within the Guideline range of 87 to 108 months.

Basis For Federal Jurisdiction

The Petitioner was charged by a three count indictment, dated August 14, 1990,

in the United States District Court, District of Maine (at Portland) with (I) conspiracy to possess with intent to distribute containing heroin in violation of Title 21, United States Code, Section 841(a)(1); Section 841(b)(1)(C) and Section 846, (II) distribution of heroin on July 23, 1990 in violation of Title 21, United States Code, Section 841(a)(1); Section 841(b)(1)(C); and Title 18, United States Code, Section 2, and (III) distribution of heroin on July 24, 1990 in violation of Title 21, United States Code, Section 841(a)(1); Section 841(b)(1)(C); and Title 18, United States Code, Section 2.

On September 26, 1990, the Petitioner appeared before Carter, CJ and entered a plea of guilty to Counts I, II and III of the Indictment.

The Petitioner appeared in the United

States District Court for sentencing on January 24, 1991 and Judgment entered on January 25, 1991. The United States Government appealed from the Judgment entered.

In United States of America v. Russell H. Wogan, 938 F.2d 1446 (1st.Cir.1991)(No. 91-1214 in the United States Court of Appeals for the First Circuit, dated July 18, 1991, the court granted the United States Government's appeal, and the Petitioner was resentenced in the United States District, District of Maine in accord the opinion of the First Circuit Court of Appeals. Judgment was entered as to the resentencing on September 16, 1991.[4]

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[4]. A separate appeal has been filed as to the resentencing Judgment.

ARGUMENT

I. THE DISTRICT COURT HAD AUTHORITY UNDER THE SENTENCING GUIDELINES TO GRANT THE PETITIONER A DOWNWARD DEPARTURE.

United States of America v. Russell H. Wogan, 938 F.2d 1446 (1st.Cir.1991)(Slip Opinion No. 91-1214) conceded "there is some authority indicating that departures may be based on a desire to equalize the sentences of similarly situated defendants in a given case". (slip opinion at 5) Recognizing this authority, the court's opinion cited several instances where the courts have exercised or noted the type of authority which would allow equalization of sentences in the same case under the Sentencing Guidelines. See United States v. Ray, 930 F.2d 1368, 1372-73 (9th Cir.1990), cert. denied, 111 S.Ct. 1084 (1991); United States v. Nelson, 918 F.2d

1286, 1273 (6th Cir.1990), United States v. Daly, 883 F.2d 313, 319, cert. denied 110 S.Ct. 2622 (1990).

The First Circuit, however, chose to follow indications in opinions of earlier cases in the First Circuit which did not regard a discrepancy in comparative sentences in the same case to justify a downward departure. United States v. Romolo, 937 F.2d 20 (1st Cir.1991) [No. 90-2187, slip op. at 13 n.5] ("discrepancies in comparative outcomes cannot justify downward departures"); United States v. Carr, 932 F.2d 67 (1st Cir.1991) [No. 90-2137, slip op. at 14-16].(district court cannot deprt merely to achieve symmetry with earlier non-guideline sentences).

In particular, the First Circuit embraced a decision in the United States Court of Appeals for the Second Circuit,

United States v. Joyner, 924 F.2d 454 (2d Cir.1991), which held that a perceived need to equalize sentencing outcomes for similarly situated codefendants, without more, will not permit a departure from a properly calculated guideline sentencing range. Reliance upon Joyner, however was misplaced.

In Joyner, supra, the Second Circuit remanded the case to the district court for resentencing because the sentencing judge had substituted his judgment of the severity of certain defendants' activity for that which was reflected by the applicable Guideline range. In effect, the sentencing judge had cast aside the Guidelines because he felt they did not provide a fair result in relation to the sentences he had previously given other defendants involved in the same offense.

It was not unreasonable for the

Second Circuit to remand for resentencing in United States v. Joyner, supra, because the Sentencing Commission presumably did fashion the Guidelines to account for the factual scenario in that case. The critical difference in the case at bar is that the Guideline Commission did not and could not have reasonably anticipated the failure of proof by the Government which occurred in the Casale sentencing, which would then be corrected later at the Petitioner's sentencing, resulting in the disparity which led the court below to grant a departure. In granting this departure, the court did not intend to suit the sentence according to the court's own appraisal of the relative severity of the defendants conduct or involvement, but it did intend to correct an unfair disparity in sentencing.

The opinion of the First Circuit

United States of America v. Russell H. Wogan, supra, notes that the chief concern of Congress was to address nationwide sentencing disparities. Unquestionably, nationwide disparity would be the central problem to be addressed from the prospective of the United State's Congress. This should not mean, however, that the Sentencing Commission withheld the authority from district court judges to address disparity among defendants in the same case when resulting from a factor not taken into account in formulating the Guidelines.

The express language in 18 U.S.C. §3553(b) and Sentencing Guideline 5K2.0 authorizing departure from the Guidelines has led to a conflict as the scope of the authority among appeals courts of the United States.

II. THERE IS A CONFLICT WITHIN CIRCUIT COURTS AND AMONG CIRCUIT COURTS AS TO THE AUTHORITY TO GRANT A DEPARTURE FROM THE GUIDELINES

The discussion supra has shown that courts reading the portions of the Sentencing Guidelines have differing opinions as to the extent of the authority to depart intended by the Congress and Sentencing Commission. There is even confusion within courts of the same circuit and different panels of the same circuit court of appeals.

In United States of America v. Russell H. Wogan, 938 F.2d 1446, supra, the First Circuit pointed out in footnote 2 that the Ninth Circuit cases "are somewhat of a motley", and cited as examples United states v. Enriquez-Munoz, 906 F.2d 1356, 1359-60 (9th Cir.1990) and United States v. Changa, 901 F.2d 741, 744 (9th Cir.1990). In Enriquez-Munoz, the

court said that upward departure for purposes of equalizing sentences of codefendants is impermissible. In Changa, the court affirmed the district court's refusal to depart downward to equalize sentences of convicted conspirators.

In the Sixth Circuit very different interpretations are stated in United States v. Parker, 912 F.2d 156 (6th Cir.1990) and United States v. Nelson, 918 F.2d 1268 (6th Cir.1990), a case decided several months after Parker. Parker instructed the district court on remand to review the comparative involvement of two defendants, and to make adjustments in the sentence based upon actual differences in the roles played by the individual defendant, but not to depart solely to equalize the sentences of two defendants. Nelson, supra, however, held that district courts are not precluded as a matter of

law, from a Guideline departure in order to generally conform one conspirator's sentence to the sentences imposed on his co-conspirators. The Nelson court felt that the departure policy was deliberately broad because of the difficulty of foreseeing a single set of guidelines which would encompass the range of conduct potentially relevant to sentencing. "Circumstances that may warrant departure from the guidelines ... cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be make by the court at the time of sentencing" Nelson, 918 F.2d at 1272.

Later, in United States v. Gessa, ----F.2d---- (August 29, 1991 WL 164506, 6th Cir.Tenn.), the Sixth Circuit specifically noted the inconsistent conclusions reached

in Parker and Nelson, but chose to follow the decision of the earlier panel in Parker because the matter had not been addressed en banc. It is apparent from these results that courts have come to differing conclusions as to the scope of downward departure from a reading of the Sentencing Guidelines.

CONCLUSION

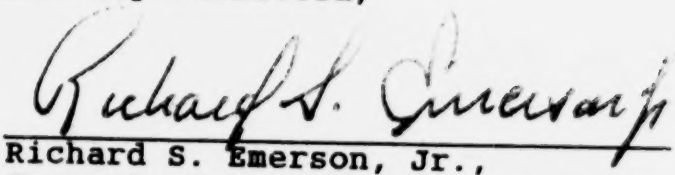
The downward departure originally granted by the district court judge would have eliminated an unjustified sentencing disparity among co-defendants in a situation not anticipated by the Sentencing Commission in formulating the Sentencing Guidelines. Specifically, the Commission did not anticipate that two defendants in the same case who were equally culpable would be subject to very different Sentencing Guidelines depending upon the Government's varying presentation

at separate sentencing hearing for different defendants.

Congress perceived a need to address nationwide sentencing disparities in authorizing the Sentencing Guidelines, but they did not intend to ignore a disparity occurring among co-defendants in the same or related case. Such a "localized" disparity certainly is apparent to the public who learn of comparative sentences through the media in the districts where they live.

The limit placed upon the district court's authority to depart downward in this case has resulted in a sentencing disparity which is not justified because is not the result of differences in the offense conduct, involvement or criminal history of the co-defendants. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Richard S. Emerson, Jr.,
Counsel of Record for Petitioner

Portland, Maine October 10, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	*
V.	* **Crim. Number**
	* **90-00042-02-P**
RUSSELL H. WOGAN	* **Indictment -**
	* **Three Counts**

Count I -- Conspiracy to Possess with Intent to Distribute -- Heroin

Counts II and III -- Possession with Intent to Distribute -- Heroin

21 U.S.C. §§ 841(a)(1) and 846

PROCEDURAL ORDER SCHEDULING GUIDELINE SENTENCING HEARING AND IMPOSITION OF SENTENCE

The Guideline Sentencing Conference having been previously held herein, this matter is hereby SCHEDULED for a Sentencing Hearing and Imposition of Sentence January 3, 1991 at 3:30 p.m. Counsel and the Defendant are to be present at that time and are to be prepared to present any evidence relevant

to sentencing issues. Counsel represented at the presentence conference that the time required for presentation of evidence, oral arguments of counsel, and allocution of Defendant will be approximately forty-five (45) minutes. Testimonial evidence will be presented.

As a result of the Presentence Conference, the Court understands from counsel that the only matters in dispute at the Hearing for purposes of determination of an appropriate Guideline Sentence are the following:

(1) Whether the facts of the offense conduct are accurately stated in ¶ 12 of the Report in the specific respects objected to by Defendant;

(2) The determination of the appropriate drug quantity to be used to determine the Base Offense Level:

(a) Whether quantities involved in

"relevant conduct" as set out in ¶ ¶ 20-21 of the Report are to be included.

(3) The determination of the applicable Guideline range for a term of incarceration; and

(4) The appropriate sentence to be imposed under the applicable Guideline.

So ORDERED.

GENE CARTER
Chief Judge

Dated at Portland, Maine this 17th day of December, 1990.

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	*
	*
v.	* **Criminal No.**
	* **90-00042-02-P**
RUSSELL H. WOGAN	* **Indictment --**
	* **Three Counts**

Count I - Conspiracy to Possess with Intent to Distribute -- Heroin

Counts II and III -- Possession with Intent to Distribute -- Heroin

21 U.S.C. §§ 841(a)(1) and 846

MEMORANDUM OF SENTENCING JUDGMENT

I. GUIDELINES COMPUTATION

A. Base Offense Level

The Court FINDS as follows:

(a) Base Offense Level: The Guideline for a 21 U.S.C. § 841(a)(1) offense is

found in § 2D1.1(a)(3) of the Guidelines. The Indictment charges that on July 23, 1990, the Defendant was in illegal possession of .19 grams of heroin and on July 24, 1990, with 5.56 grams of heroin. The Court FINDS that the aggregate amount of heroin involved in the offense conduct is five and seventy-five hundredths (5.75) grams of heroin.[1]

At the Presentence Conference, counsel stipulated that the drug quantity involved in the offense conduct to be utilized to determine the Base Offense Level is as found above; whether any amount involved in any "related conduct" should be used

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[1]In determining sentence in this case, the Court has compared the content of the applicable Guidelines before and after the revision of November 1, 1989 and has utilized to determine the incidents of that sentence to be imposed upon this Defendant those provisions of the Guidelines which most favor the Defendant's interests in the sentencing process.

remained in dispute.

(b) The Defendant has pled guilty to three counts of the Indictment and, pursuant to § 3D1.2(b)(1) (version of November 1, 1989), "All counts involving substantially the same harm shall be grouped together into a single group . . . including . . . a count charging conspiracy or solicitation and a count charging any substantive offense that was the sole object of the conspiracy or solicitation . . ." The Court CONCLUDES that all counts are to be grouped for imposition of sentence FINDING that the offenses charged in Counts II and III were the sole object of the conspiracy offense charged in Count I.

The parties agreed to this finding.

(c) Guideline § 1B1.3 states that relevant

conduct shall be determined on the basis of "all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable . . . ." The Commentary for that section states that ". . . in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of a common scheme or plan as the count of conviction."

(d) Defendant has acknowledged numerous trips to Massachusetts for the purpose of obtaining quantities of heroin.

(e) The Court FINDS that during the twenty-five (25) week period from February 1, 1990 to July 24, 1990, the defendants, Casale and Wogan, acting together, purchases at least five

hundred (500) bags of heroin each week, each bag containing at least six hundredths (.06) of a gram of heroin, for a total amount of seven hundred fifty (750) grams of heroin involved in the related conduct. The Court FINDS that the total drug quantity of heroin to be used to determine the Base Offense Level herein to be seven hundred fifty-five and seventy-five hundredths (755.75) grams. Pursuant to § 2D1.1(a)(3)(C)(7), the Defendant's Base Offense Level herein is Level "30". The reasons for the foregoing findings were expressed upon the record at imposition of sentence.

(f) The combined Adjusted Offense Level is subject to a reduction of two (2) levels, to Level "28," pursuant to § 3E1.1(a) because the Court not FINDS that the Defendant has accepted

responsibility for the offense conduct.

The Court CONCLUDES that this Defendant's Adjusted Total Offense Level is Level "28," that his Criminal History Category is Category II, and that the applicable Guideline range is eighty-seven (87) to one hundred eight (108) months.

B. Findings

The Court FINDS the facts to be as set out in ¶¶ 1/11, 29-41, 43-38, 56-70, 76 and 79 of the Report, counsel advising the Court that there is no dispute as to the facts as therein stated.

The Court OVERRULES Defendant's objections to the content of ¶¶ 12, 13, 21 and 22 of the Report, the Court having made prior specific findings as to the drug quantity involved in the related conduct as recited in ¶¶ 12, 13, and 22. The Court FINDS the facts to be as stated in ¶ 21.

C. Departure

The Court CONCLUDES that there is good reason pursuant to § 5K2.0 to, sua sponte, justify a departure from the Guideline range. Defendant's request for downward departure is hereby GRANTED for reasons stated on the record at imposition of sentence. The extent of the departure is governed by the Court's conclusion that in order to avoid unwarranted disparity between the sentence of this Defendant and that of codefendant Daniel J. Casale, this Defendant should not be sentenced to a longer term of incarceration than Casale, who received a sentence of twenty-seven (27) months.

II. FINDINGS WITH RESPECT TO FINES

A.

In respect to the fine determination, the Court FINDS that the Guideline range for a fine is Four Thousand Dollars

($4,000.00) to One Million Dollars ($1,000,000.00) under Guideline § 5E1.2(c)(3) and (4); and (2) that Defendant is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of any fine, including the additional fine required by 5E1.2, and such fines are hereby ORDERED TO BE WAIVED pursuant to the terms of subsections (i) and (f) of Guideline § 5E1.2. The Court, having considered alternative sanctions in lieu of the waived fines, finds no sanction to be available.

III. PROBATION

The Court CONCLUDES that Defendant is not eligible for admission to probation under § 5B1.1(a)(2) and 18 U.S.C. § 3561 because the minimum Guideline term of incarceration is more than six (6) months.

IV. SUPERVISED RELEASE

The Court CONCLUDES that a minimum term of three (3) years of supervised release is mandated pursuant to 21 U.S.C. § 841(b)(1)(C) and Guideline § 5D1.2(s). The Court FINDS that a term of five (5) years supervised release is required for future protection of the public and to maximize this Defendant's potential for rehabilitation once released from incarceration.

V. JUDGMENT

IT IS HEREBY ADJUDGED that on Counts I, II, and III of the Indictment herein, the Defendant be, and he is hereby, committed to the custody of the Attorney General of the United States of his authorized representative for imprisonment for a term of twenty-seven (27) months.

IT IS FURTHER ADJUDGED that all fines herein, including the additional fine pursuant to § 5E1.2, are hereby WAIVED

pursuant to § 5E1.2(f) and (i).

IT IF FURTHER ADJUDGED that on the Indictment herein, Defendant shall serve a term of Supervised Release, under § 5D1.2(a) and 21 U.S.C. § 841(b)(1)(C), of five (5) years, to commence upon his release from incarceration.

The conditions of such Supervised Release shall be those specified in Guideline § 5B1.4(a)(1)-(13) and the "special" conditions that:

(1) Defendant not commit any crimes, federal, state of local, during the period of his supervised release;

(2) Defendant shall remain continuously and gainfully employed during the period of supervised release;

(3) Defendant participate in a program of drug abuse therapy to the satisfaction of his supervising officer during the period of his supervised release,

which may include testing to determine whether Defendant has made any use of drugs; and

(4) Defendant fully abstain from use or possession of all contraband substances and intoxicants during the period of his supervised release.

IT IS FURTHER ADJUDGED that Defendant pay a felony assessment of Fifty Dollars ($50.00) on each count of conviction, for a total amount of One Hundred Fifty Dollars ($150.00)

The Court stated the reasons for this sentence on the record at imposition of sentence.

It is ORDERED that Defendant be, and he is hereby, REMANDED forthwith in execution of the incarceration term of this sentence.

Defendant was advised of his right to appeal the sentence imposed.

ss/GENE CARTER

Chief Judge

Dated at Portland, Maine this 24th day of January, 1991.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 91-1214

UNITED STATES,

Appellant,

v.

RUSSELL H. WOGAN,

Defendant, appellee.

JUDGMENT

Entered: July 18, 1991

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The defendant's conviction is affirmed, his sentence is vacated, and the cause is remanded to the district court for

resentencing within the applicable guideline range.

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 91-1214

UNITED STATES OF AMERICA,

Appellant,

v.

RUSSELL H. WOGAN,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES

DISTRICT COURT

FOR THE DISTRICT OF MAINE

[Hon. Gene Carter, U.S. District Judge]

Before

Sela and Cyr, Circuit Judges,

and Keeton,* District Judge.

F. Mark Terison, Assistant United States Attorney, with whom Richard S.

Cohen, United States Attorney, was on brief for appellant.

William W. McCandless, Jr., by appointment of the Court, for appellee.

July 18, 1991

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*Of the District of Massachusetts, sitting by designation.

SELYA, Circuit Judge. In this criminal appeal, the government contends that there were no valid grounds for departing below the guideline sentencing range (GSR). We agree. Hence, we vacate the sentence and remand for resentencing.

BACKGROUND

Defendant-appellee Russell H. Wogan and a codefendant, Daniel J. Casale, were charged with possession of heroin with intent to distribute, distribution of heroin, and conspiracy to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), 846 and 18 U.S.C. §2. The record shows that Wogan and Casale were joint venturers in the classic sense: the level and extent of their participation was, to all intents and purposes, approximately the same. On September 5, 1990, Casale pled guilty to all three counts of the indictment. On September 26,

Wogan followed suit.

The codefendants were sentenced separately. At Casale's sentencing hearing, held on November 21, 1990, the district judge took evidence. Although all parties agree that the government acted in good faith, it was nevertheless slipshod in building a record. On the evidence as presented, the judge found as a fact that only 10.19 grams of heroin were includable within the scope of defendant's "relevant conduct." U.S.S.G. § 1B1.3(a); see generally United States v. Sklar, 920 F.2d 107, 110 (1st Cir. 1990) (explicating concept of "relevant conduct"); United States v. Blanco, 888 F.2d 907, 909-11 (1st Cir. 1989) (explicating mechanical operation of concept). The judge therefore fixed the base offense level at 16, see U.S.S.G. § 2D1.1(c)(14) (Drug Quantity Table) (establishing base offense level at

16 where includable conduct implicates "[a]t least 10 G but less than 20 G of heroin"); deducted two levels for acceptance of responsibility, U.S.S.G. § 3E1.1(a); determined that Casale was in criminal history category III; computed the GSR to be 21-27 months, see U.S.S.G. Ch.5, Pt. A (Sentencing Table); and sentenced Casale to 27 months in prison.

On January 3, 1991, Wogan's sentencing hearing was convened. The government took greater pains to build an adequate record. When the hearing ended, the judge reserved decision. Three weeks later, he found as a fact that the amount of heroin actually involved in the codefendants' relevant conduct was not 10.19 grams, but 755.75 grams. Premised on this finding, the judge fixed the base offense level at 30, see U.S.S.G. § 2D1.1(c)(7) (Drug Quantity Table) (establishing base offense level at

30 where includable conduct implicates "[a]t least 700 G but less than 1 KG of heroin"); deducted two levels for acceptance of responsibility; determined that Wogan was in criminal history category II; computed the GSR to be 87-1-8 months, see U.S.S.G. Ch.5, Pt. A (Sentencing Table); and then opted to depart downward. The court grounded the downward departure on "considerations of fairness," expressing the viewpoint that

> to sentence two defendants in the same case, guilty of essentially of the same conduct, the same facts, to sentences as disparate as 27 months in one case and 108 months in another case, ... frustrates and violates ... the underlying concept of the eradication of disparity that is contemplated by the Guidelines, and . . . the Court is justified in departing . . . in order to obviate and to avoid that effect.

Consequently, the court sentenced Wogan to a 27-month term of imprisonment, thereby achieving parity between Wogan and Casale.

The judgment of the district court was entered on January 25, 1991. The government filed a timely notice of appeal. We have jurisdiction pursuant to 18 U.S.C. § 3742(b)(3).

Discussion

We examine the propriety of a departure from the GSR, regardless of direction, in accordance with the three-pronged test formulated in United States v. Diaz-Villafane, 874 F.2d 43, 49 (1st Cir.), cert. denied, 110 S. Ct. 177 (1989). The first prong requires us to consider whether, taking the reasons for departure stated by the district court at face value, those reasons will as a matter of law justify abandonment of the guidelines. Id. On this aspect of the departure calculus, our review is de novo. See United States v. Norflett, 922 F.2d 50, 52 (1st Cir. 1990).

Here, there was but a single pallet on which the downward departure rested: the district court's stated desire, in the interests of fairness, to equalize the sentences of two similarly situated codefendants. The pallet cannot sustain the weight of the cargo placed upon it.

Under the Sentencing Reform Act, a district court may depart from the guidelines if it "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C § 3553(b); see also U.S.S.G. § 5K2.0 (implementing statute); see generally Sklar, 920 F.2d at 115; Diaz-Villafane, 874 F.2d at 49. We have repeatedly emphasized that, to enable a district court to depart under section

5K2.), "there must be something 'special' about a given offender, or the accouterments of the crime committed, which distinguishes the case from the mine-run for that offense." United States v. Aquilar-Pena, 887 F.2d 347, 350 (1st Cir. 1989). In this instance, the court's departure was not based on any special characteristic possessed by Wogan or on any meaningful typicality in his offense behavior; rather, the court reduced Wogan's sentence below the guideline range solely in an effort to achieve parity between Wogan and his codefendant.[1] We do not

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[1]W find considerable irony in the fact that the district court, having concluded that it erred in finding too modest a drug quantity when sentencing Casale, in effect perpetuated and compounded the error by setting Wogan's sentence as if the drug quantity tabulated at Casale's sentencing was accurate. While we understand the district court's desire to equalize the codefendants' sentences by the only method available - there being no practicable way to increase Casale's sentence under the

think that such a departure can stand.

To be sure, there is some authority indicating that departures may be based on a desire to equalize the sentences of similarly situated defendants in a given case. See, e.g., United States v. Ray, 930 F.2d 1368, 1372-73 (9th Cir. 1990) (where some codefendants had received mild sentences during period when Ninth Circuit had declared sentencing guidelines unconstitutional, justice required downward departure as to later-sentenced codefendant to avoid disparate treatment), cert. denied, 111 S. Ct. 1084 (1991);[2] United

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circumstances - we are constrained to not that, in terms of the sentencing guidelines as elsewhere in the law, "two wrongs seldom make a right." R.W. Int'l Corp. v. Welch Foods, Inc., _____ F.2d _____, _____ (1st Cir. 1991) [No. 91-1058, slip op. 18].

[2]The Ninth Circuit cases, however, are somewhat of a motley. See, e.g., United States v. Enriquez-Munoz, 906 F.2d 1356, 1359-60 (9th Cir. 1990) (upward departure for purposes of equalizing sentences of

States v. Nelson, 918 F.2d 1268, 1273 (6th Cir. 1990) (district courts "are not precluded as a matter of law from departing from the guidelines in order to generally conform one conspirator's sentence to the sentence imposed on his co-conspirators") (emphasis in original);[3] see also United States v. Daly, 883 F.2d 313, 319 (4th Cir. 1989) (dictum), cert. denied, 110 S. Ct. 2622 (1990). Indeed, it was in reliance on Daly that the court below essayed its downward departure.

Whatever thoughts may be entertained elsewhere, the legal landscape in this

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codefendants is impermissible); United States v. Changa, 901 F.2d 741, 744 (9th Cir. 1990) (affirming district court's refusal to depart downward to equalize sentences of convicted coconspirators).

[3]But see United States v. Parker, 912 F.2d 156, 158 (6th cir. 1990) (district court may not "depart from the sentencing range established by the guidelines based solely on [a codefendant's] sentence").

circuit has come into sharp focus since Wogan was sentenced. This court has embraced the well-reasoned decision of the Second Circuit in United States v. Joyner, 924 F.2d 454, 459-61 (2d Cir. 1991), and has held squarely that a perceived need to equalize sentencing outcomes for similarly situated codefendants, without more, will not permit a departure from a properly calculated guideline sentencing range. See United States v. Romolo, _____ F.2d _____, ____ n.5 (1st Cir. 1991) [No. 90-2187, slip op. at 13 n.5] ("discrepancies in comparative outcomes cannot justify downward departures"); United States v. Carr, _____ F.2d _____, (1st Cir. 1991) [No. 90-2137, slip op. at 14-16] (same); cf. United States v. Brown, 899 F.2d 94, 98 (1st Cir. 1990) (district court cannot depart merely to achieve symmetry with earlier non-guidelines sentences).

The legal provenance of these holdings is, we suggest, impeccable. Congress' objective in enacting sentencing reform legislation was, after all, to eliminate nationwide disparity among equivalent offenders. See Aguilar-Pena, 887 F.2d at 351-53. Yet, reducing a defendant's sentence below the GSR to equalize his sentence with one previously imposed on a codefendant promotes, rather than reduces, nationwide disparities by "creat[ing] a new and entirely unwarranted disparity between the defendant's sentence and that of all similarly situated defendants throughout the country." Joyner, 924 F.2d at 460-61. And Congress' chief concern, as we understand it, was to safeguard the macrocosm of the sentencing universe from differential treatment, even if, occasionally, that valued prophylaxis might be attained at the expense of some

disparity within a particular microcosm of the sentencing universe. Hence, the thrust toward equalization of sentences within a single case is not, and by itself cannot be, "an aggravating or mitigating circumstance" as that phrase was employed by Congress in enacting 18 U.S.C. § 3553(b) and reiterated by the Sentencing Commission in crafting U.S.S.G. § 5K2.0.

Conclusion

We need go no further. We have held, time and again, that in a multi-panel circuit, prior panel decisions are binding upon newly constituted panels in the absence of supervening authority sufficient to warrant disregard of established precedent. See, e.g., Jusino v. Zayas, 875 F.2d 986, 993 (1st Cir. 1989); United States v. Reveron Martinez, 836 F.2d 684, 687 (1st Cir. 1988); Lacy v. Gardino, 791 F.2d 980, 985 (1st Cir.). Cert. denied, 479

U.S. 888 (1986). So here. Carr and its progeny control.

We do pause to add an eschatocol of sorts. While we understand that the court below was motivated by a desire to bring about what it foresaw as a fairer result, all things considered, the principles upon which the guidelines rest cannot "be adulterated by a judge's personal sense if inequity, no matter how well-intentioned the judge may be." Norflett, 922 F.2d at 54. That means, of course, that "[d]issatisfaction with the guidelines or with the range of choices they produce in particular cases does not in itself warrant departure, whether up or down." Id.; see also Carr, _____ F.2d at _____ [slip op. at 15]; Aguilar-Pena, 887 F.2d at 353.

The defendant's conviction is affirmed, his sentence is vacated, and the cause is remanded for resentencing within

the applicable guideline range.

United States Sentencing Guidelines

Part A(4)(b)

The new sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance of a kind or to a degree, not adequately taken into consideration by the Sentencing Commission ...". 18 U.S.C. § 3553(b).

Thus, in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the courts' departure powers. The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical

case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), the third sentence of §5H1.4, and the last sentence of §5K2.12, list a few factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two basic reasons. First is the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct

potentially relevant to a sentencing decision. The Commission also recognizes that in the initial set of guidelines it need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create more accurate guidelines that specify precisely where departures should and should not be permitted.

Second, the Commission believes that despite the court's legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's sentencing data indicate make a significant difference in sentencing at

the present time. Thus, for example, where the presence of actual physical injury currently makes an important difference in final sentences, as in the case of robbery, assault, or arson, the guidelines specifically instruct the judge to use this factor to augment the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data do not permit the Commission, at this time, to conclude that the factor is empirically important in relation to the particular offense. Of course, a factor (say physical injury) may nonetheless sometimes occur in connection with a crime (such as fraud) where it does not often occur. If, however, as the data indicate, such occurrences are rare, they are precisely the type of events that the court's departure powers were designed to cover -- unusual cases outside the range of

the more typical offenses for which the guidelines were designed. Of course, the Commission recognizes that even its collection and analysis of 10,000 presentence reports are an imperfect source of data sentencing estimates. Rather than rely heavily at this time upon impressionistic accounts, however, the Commission believes it wiser to wait and collect additional data from our continuing monitoring process that may demonstrate how the guidelines work in practice before further modification.

It is important to note that the guidelines refer to two different kinds of departure.

The first kind involves instances in which the guidelines provide specific guidance for departure, by analogy or by other numerical or non-numerical suggestions. For example, the commentary

to §2G1.1 (Transportation for Prostitution), recommends a downward adjustment of eight levels where commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions, and that the court of appeals may prove more likely to find departures "unreasonable" where they fall outside suggested levels.

A second kind of departure will remain unguided. It may rest upon grounds referred to in Chapter 5, Part K (Departures), or on grounds not mentioned in the guidelines. While Chapter 5, Part K lists factors that the Commission believes may constitute grounds for departure, those suggested grounds are not exhaustive. The Commission recognizes that there may be other grounds for departure that are not

mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly unusual.

United States Sentencing Guidelines

§5K2.0 **Grounds for Departure (Policy Statement)**

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing. Nonetheless, the

present section seeks to aid the court by identifying some of the factors that the Commission has not been able to fully take into account in formulating precise guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure, from the guidelines, under some circumstances, in the discretion of the sentencing judge. Similarly, the court may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines (e.g., as an adjustment or specific offense characteristic), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where the applicable guidelines, specific offense characteristics, and

adjustments do take into consideration a factor listed in this part, departure from the guideline is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the offense of conviction is bribery or obstruction of justice. Then the offense of conviction is theft, however, when the theft caused disruption of a governmental function, departure from the applicable guideline more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the offense of conviction is robbery because the robbery guideline includes a specific sentence adjustment based ont he extent of an injury. However,

because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured. Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

Harms identified as a possible basis for departure from the guidelines, should be taken into account only when they are relevant to the offense of conviction,

within the limitations set forth in §1B1.3.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 57).

18 U.S.C. § 3553(b)

Application of Guidelines in Imposing a Sentence--

The court shall impose a sentence of the kind and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impost an appropriate sentence, having due regard for the purposes set

forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.